



July 26, 1999

Mr. Ruben Barrera
Strasburger & Price, L.L.P.
Counsel for San Antonio Water System
800 One Alamo Center
108 South Saint Mary's Street
San Antonio, Texas 78205

OR99-2092

Dear Mr. Barrera:

You have asked whether certain information is subject to required public disclosure under the Public Information Act (the "act"), chapter 552 of the Government Code. Your request was assigned ID# 125487.

The San Antonio Water System ("SAWS"), which you represent, received the following request for

All letters, correspondence, e-mail messages, memoranda, meeting minutes, phone logs or other documents which mention or pertain to development and/or execution of the contract dated 12/31/98 between San Antonio Water System and the Aluminum Company of America.

In response to the request, you submit to this office for review the information at issue labeled as categories 1A through 6. You state that SAWS will make available to the requestor some responsive information. You contend, however, that the submitted information is excepted from required public disclosure pursuant to sections 552.104, 552.105, 552.107, and 552.111 of the Government Code. You also claim that a portion of the requested information is "personal notes of an individual employee" not subject to the act. You further claim that a portion of the requested information is "Executive Session Communications," thus made confidential under chapter 551 of the Government Code. We have considered the exceptions and arguments you have raised and reviewed the submitted information.¹

¹You argue that because the requestor only seeks documents "which mention or pertain to development and/or execution of the contract dated 12/31/98," the only responsive items are those "created on or before December 31, 1998." Since you have made this determination and not submitted any records created after December 31, 1998, we will not consider the applicability of the claimed exceptions for such information. We note that a governmental body is not expected to produce information which does not exist, nor does the act require a governmental body to prepare new information. Open Records Decision Nos. 605 (1992), 555 (1990), 362 (1983).

At the outset, we consider your assertion that categories 3a and 3b are “not subject to the Public Information Act,” since they constitute personal notes of an employee. Section 552.021 of the act provides for public access to “public information.” Section 552.002 defines “public information” as “information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business . . . (1) by a governmental body” . . . or (2) for a governmental body and the governmental body owns the information or has a right of access to it.” While Open Records Decision No. 77 (1975) found that personal notes made by individual faculty members for their own use as memory aids were not subject to the act, Open Records Decision No. 450 (1986) found that notes of appraisers taken in the course of teacher appraisals were public information. *See also* Open Records Decision Nos. 635 (1995) (public official’s or employee’s appointment calendar, including personal entries, may be subject to act) 626 (1994) (handwritten notes taken during oral interview by Texas Department of Public Safety promotion board members public information) 145 (1976) (handwritten notes on university president’s calendar not public information), 120 (1976) (faculty members’ written evaluations of doctoral student’s qualifying exam subject to act), 116 (1975) (portions of desk calendar kept by governor’s aide and aide’s notes made solely for his own informational purposes not public information).

You explain that categories 3a and 3b consist of “personal notes made by SAWS staff” which contain opinions, recommendations and advice of the SAWS employees. You further represent that the information in these categories is “related to policy making processes and functions of SAWS.” Based on your representations and our review of the records, we believe that the information at issue in categories 3a and 3b consists of “information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business.” *See* Gov’t Code § Section 552.002. Therefore, we conclude that categories 3a and 3b of the submitted records are subject to the act, and we must consider whether your claimed exception under section 552.111 is applicable to the handwritten notes.

We next consider your assertion that the documents in category 2a of the request are excepted from required disclosure as records of an executive session. Section 551.104 of the Government Code, a provision of the Open Meetings Act, makes the certified agenda and tape of a properly closed meeting confidential. An audiotape recording or certified agenda of a closed meeting is available for public inspection and copying only under a court order. Gov’t Code § 551.104; Open Records Decision No. 495 at 4 (1988) (audiotape recordings of closed meetings are confidential unless court rules otherwise). Furthermore, section 551.146 provides that it is a criminal offense to disclose to a member of the public the certified agenda or audiotape recording of a closed meeting. However, records that were discussed in a closed meeting and records created in a closed meeting, other than a certified agenda or tape recording, are not made confidential by chapter 551 of the Government Code. Open Records Decision No. 605 (1992). You have submitted certain records, submitted as category 2a, which you characterize as “outlines used in staff presentations to the SAWS Board of Trustees

in executive session.” Category 2a of the submitted information is *not* “[t]he certified agenda or tape of a closed meeting.” Therefore, the records in category 2a are not confidential under section 551.104, and we will consider your section 552.111 arguments against disclosure.

Since you have raised section 552.111 for most of the submitted categories of information, we will next consider the applicability of this exception to the submitted records.² Section 552.111 excepts from disclosure inter-agency or intra-agency communications consisting of advice, recommendations, opinions, and other material reflecting the deliberative or policymaking processes of the governmental body. *See Texas Dep’t of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.--Austin 1992, no writ); Open Records Decision No. 615 at 5 (1993). This exception applies not only to a governmental body’s internal memoranda, but also to memoranda prepared for a governmental body by its outside consultant.³ Open Records Decision Nos. 462 at 14 (1987), 298 at 2 (1981). The purpose of this section is “to protect from public disclosure advice and opinions *on policy matters* and to encourage frank and open discussion within the agency in connection with its decision-making processes.” *Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.--San Antonio 1982, writ ref’d n.r.e.) (emphasis added).

Section 552.111 also excepts from required public disclosure preliminary *drafts* of documents if those documents are related to policymaking matters, since drafts represent the advice, opinion, and recommendation of the drafter as to the form and content of the final documents. *See* Open Records Decision No. 559 (1990). Section 552.111 does not protect facts and written observation of facts and events that are severable from advice, opinions, and recommendation. Open Records Decision No. 615. However, when such factual matter is contained in the final version of the document, the release of the final version satisfies this requirement. *Id.*

The documents before us, consisting of drafts of the contract at issue and submitted as categories 1a, 1b and 1c, directly pertain to policy matters concerning SAWS. Since you have represented that “the contract between [SAWS] and the Aluminum Company of America” (“Alcoa”) will be provided to the requestor, we conclude that SAWS may withhold the draft documents, categories 1a, 1b and 1c, in their entirety pursuant to section 552.111. We also

²You claim that section 552.111 is applicable to categories 1a, 1b, 1c, 2a, 2b, 2c, 2d, 3a, 3b, 4, 5a, 5b and 6 of the submitted information. We advise you that to the extent that SAWS has revealed the substance of the drafts and documents at issue to another party in the negotiations or outside the agency, there would be no rationale for withholding such information from the public at this time under section 552.111. Such a disclosure constitutes SAW’s *waiver* of the protection under section 552.111. *Cf.* Open Records Decision No. 137 at 5 (1976).

³In Open Records Decision No. 631 (1995), this office concluded that the policymaking functions of a governmental body include an outside consultant’s advice, recommendations, and opinions regarding administrative and personnel matters of broad scope that affect the governmental body’s policy mission.

conclude that categories 2a, 2b, 2c, 2d, 3a, 3b, 4 and 5a consist “of advice, recommendations, opinions, and other material reflecting the deliberative or policymaking processes” of SAWS; therefore, the recited categories of records may also be withheld under section 552.111 of the Government Code. As for category 6 of the requested information, we have marked the information that SAWS may withhold from the public pursuant to section 552.111. We note that you may not withhold any information within category 5b under section 552.111; however, some of the information may be protected by another exception discussed below. The remaining information should be released, unless subject to an exception discussed below.

We next consider whether the remaining information, for which section 552.111 was either inapplicable or not raised, is subject to your other claimed exceptions. You raise both sections 552.104 and 552.105 for category 5c of the submitted information. Section 552.104 excepts from required public disclosure “information that, if released, would give advantage to a competitor or bidder.” The purpose of this exception is to protect the purchasing interests of a governmental body, usually in competitive bidding situations prior to the awarding of a contract. Open Records Decision No. 593 at 2 (1991). Section 552.104 requires a showing of some actual or specific harm in a particular competitive situation. Open Records Decision No. 541 at 4 (1990).

Section 552.105 excepts from required public disclosure information “relating to”

- (1) the location of real or personal property for a public purpose prior to public announcement of the project; or
- (2) appraisals or purchase price of real or personal property for a public purpose prior to the formal award of contracts for the property.

This exception protects a governmental body’s planning and negotiating position with respect to particular transactions and its protection is therefore limited in duration. Open Records Decision No. 357 (1982). To show the applicability of section 552.105, a governmental body must first make a good faith determination that the release of information could damage its negotiating position with respect to the acquisition of property, subject to review by this office. Open Records Decision No. 564 (1990). Section 552.105(1) is generally inapplicable when the governmental body has publicly announced the project. Section 552.105(2) is generally inapplicable once the governmental body has entered into a final contract for the property at issue. Open Records Decision No. 222 (1979).

You generally argue that sections 552.104 and 552.105 apply to the information within category 5c because “SAWS must compete with other governmental and private interests that are seeking to acquire water resources.” Based on a review of the submitted records, it appears that the records only relate to the contract with Alcoa, which was signed on December 31, 1998. Under the facts presented, you have not demonstrated any potential specific harm to

SAWS' interests in a particular competitive situation. *See* Open Records Decision No. 541 (1990); *see also* Open Records Decision No. 593 at 2 (1991). You have provided nothing more than a general allegation of a possible advantage. We do not believe that in this case you have shown the applicability of either section 552.104 or 552.105 to the information within category 5c. *See* Gov't Code 552.301(b)(1); Open Records Decision Nos. 541 at 4 (1990), 520 at 4 (1989). Furthermore, based on your brief, we understand that a contract between SAWS and Alcoa was signed on December 31, 1998. Once the bidding process is completed and the terms of the agreements have been finalized, you may not rely on section 552.104 to withhold information. Open Records Decision No. 541 at 5 (1990). Consequently, the information within category 5c may not be withheld under either section 552.104 or section 552.105.

Before we conclude our analysis, we note that although you have not raised any other applicable exception, based on the records at issue, we must consider whether some of the submitted information should be excepted from required public disclosure under sections 552.117 of the Government Code.⁴ Section 552.117 of the Government Code reads in relevant part:

Information is excepted from the [public disclosure] requirements of Section 552.021 if it is information that relates to the home address, home telephone number, or social security number, or that reveals whether the following person has family members:

(1) a current or former official or employee of a governmental body, except as otherwise provided by Section 552.024;

(2) a peace officer as defined by Article 2.12, Code of Criminal Procedure, or a security officer commissioned under Section 51.212, Education Code, regardless of whether the officer complies with Section 552.024;

Section 552.117(1) requires you to withhold information pertaining to a current or former employee or official who requested that this information be kept confidential under section

⁴The Office of the Attorney General will raise an exception on behalf of a governmental body when necessary to protect third-party interests. *See generally* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

552.024. Section 552.117(1) requires SAWS to withhold this information for an official, employee, or former employee who requested that this information be kept confidential under section 552.024. *See* Open Records Decision Nos. 622 (1994), 455 (1987). In this instance, if the individuals whose information is at issue have “requested that this information not be made available to the public,” then such information must be withheld. You may not, however, withhold this information if the employee had not made a request for confidentiality under section 552.024 prior to the time this request for the documents was made. Whether a particular piece of information is public must be determined at the time the request for it is made. Open Records Decision No. 530 at 5 (1989). Accordingly, you must redact the information subject to section 552.117 wherever it is located in the submitted records. *See* Gov’t Code § 552.352 (distribution of confidential information is criminal offense).

As we resolve your request under the exceptions discussed above, we need not specifically address your other claimed exceptions at this time.⁵ We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Sincerely

A handwritten signature in black ink, appearing to read "Sam Haddad". The signature is fluid and cursive, with a large loop at the beginning and a long, sweeping tail that extends to the right.

Sam Haddad
Assistant Attorney General
Open Records Division

SH/nc

Ref.: ID# 125487

Encl.: Submitted documents

⁵Since most of the requested information is excepted from required public disclosure under an applicable exception and the remaining records do not appear to implicate third party interests we will not delve into section 552.110 analysis for the remaining records. *See* Gov’t Code §§ 552.110, 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released).

cc: Ms. Ann Mesrobian
Conservation Chair
Bastrop County Environmental Network
P.O. Box 1069
Bastrop, Texas 78602
(w/o enclosures)

Mr. Roger Nevola
Counsel for Aluminum Company of America
P.O. Box 2103
Austin, Texas 78768
(w/o enclosures)